Form 1. DAILY RECORD CORP.

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: CARDAMONE, J.P., SIMONS, HANCOCK, CALLAHAN, MOULE, JJ.

People of the State of New York, Respondent,

v.

Brian Miller, Appellant. 80-6758

The above named Brian Miller

having appealed to this Court from a judgment

of the Supreme Court, entered in the

Erie County Clerk's office on May 23, 1979

and said appeal having been argued by

Charles Halvorsen of counsel for appellant,

Kurt Sajda of counsel for respondent,

and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously affirmed (see People v. Graham, 76 AD2d 228).

Entered: JAN 16 1981

MARY F. ZOLLER, *Clerk*

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State of New York
Court of Appeals

BEFORE: HON. MATTHEW J. JASEN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

BRIAN MILLER,

Appellant.

CERTIFICATE DENYING LEAVE

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
March 23, 19 81.

Associate Judge

*Description of Order: Order of Appellate Division, Fourth Department, entered January 16, 1981, affirming Supreme Court, Erie County, judgment entered May 23, 1979.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

v.

BRIAN MILLER

Defendant

EDWARD C. COSGROVE, District Attorney
(Barry A. Zavah of counsel)
for the People

DENNIS DENNY and RICHARD SULLIVAN
for Defendant

MEMORANDUM

ARMER, J.

By memorandum of April 17, 1979 suppression of a statement claimed made by defendant was denied. A memorandum of law was subsequently received from defendant, and the authorities cited therein. are noted, examined by this court, and its prior findings reconsidered.

This court thereupon finds in the event that such finding is not deemed to have been heretofore made, that there was such a definite pronounced break between the interrogations which were the subject of the hearing held that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questionin (People v. Chapple, 38 NY2d 112, 115). This was not his first contact with police (cf. U.S. ex rel B. v. Shelly, 430 F 2d 215, 219) Defendant

was not the subject of illegal detention (cf People v. Kocik, 63 AD2d 230, ; 407 NYS2d 929, 931). He did not indicate a desire to speak to a lawyer (cf People v. Jackson, 41 NY2d 146, 148; People v. Grant, 45 NY2d 366). Defendant was unquestionably well acquainted with his Miranda rights at the time of the second questioning having heard them many times prior thereto (cf People v. Johnson, 45 NY2d 519, ; 408 NYS2d 519, 523). Matter of Osualdo M., 409 NYS2d 152 is not germane to the issue here present.

Suppression continues denied.

Dated: April 23, 1979
Buffalo, New York

Leon N. Armer

LEON N. ARMER
Justice of Supreme Court

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

v.

Indictment 43,781

BRIAN MILLER

Defendant

EDWARD C. COSGROVE, District Attorney
(Barry A. Zavah of counsel)
for the People

DENNIS DENNY and RICHARD SULLIVAN
for Defendant

MEMORANDUM

ARMER, J.

Defendant has moved to suppress certain statements purportedly obtained from him relative to an indictment pending charging murder, second degree and other charges. Suppression of the statement obtained by Detective Jerome McIntee of the District Attorney's Office was granted from the bench. Decision was reserved as to a statement claimed subsequently taken by members of the Homicide Squad of the Buffalo Police Department.

Upon the evidence produced, this court finds and determines as follows:

On November 12, 1977 two persons died in a fire at 277 Fillmore Street in the City of Buffalo. At about 5:20 p.m. on December 23, 1977

defendant was arrested in a private residence, apparently his home, by Detective McIntee and others. While the officers had no arrest warrant, they did have the right then and there to make the arrest (CPL 140.10[1b] 140.15[4]), they then being in possession of evidence of admissions claimed made by defendant to certain citizens not police or peace officers. Since the Buffalo City Court, the applicable local criminal court, was not then sitting, immediate arraignment could not be had (cf CPL 140.20 [1]), and the officers did have the right, within constitutional limits, to make inquiry of defendant concerning the matter (CPL 140.20 [4]). At the time of his arrest, defendant had been drinking and while Detective McIntee unquestionably repeatedly gave defendant his Miranda warnings, there is, on the totality of the evidence, no satisfactory showing that defendant knowingly, intelligently and voluntarily waived his right to have an attorney present at that questioning, although this court does specifically find that at no time thereat did defendant request the presence or assistance of counsel." Nor can it be said on this record on the question of the voluntariness of defendant's acts, that the evidence obtained is free from doubt that it was not in some measure the product of the menace toward and promises made to him implicit in the conduct and statement of Detective McIntee.

While the proof thereon does reflect overtones to the effect that defendant was not only well aware of what he was doing, but indeed toying with his interrogators to seek advantage for himself, the People have failed, as concerns this statement to sustain the burden of proof imposed upon them.

At about 7:30 p.m. on the same day a considerable period of time after the close of the first interrogation, Detectives Dove and Suszek of the Homicide Squad removed defendant from his cell and questioned defendant. He was again fully advised by them of his rights. These officers conscientiously honored the burdens imposed upon police by Miranda and related cases and law and made certain that he understood these rights and waived the same before proceeding. There is no indication that at that time he was under the effects of any intoxicating materials imbibed by him earlier in the day and this court finds that he was not. He waived his right to decline or refuse to speak on the subject at hand, as well as his right to have an attorney present while speaking. He made no claim of threats or promises directed to him by Suszek and Dove, and indeed none were made by them. The statement given to them bears no taint from the prior conduct of McIntee since it was a detached, free and rational choice of defendant, under circumstances so removed from McIntee's apparent improper acts, as to be an independent act of defendant. He was uninfluenced thereby insofar as his speaking to Dove and Suszek is concerned. This statement was therefore not the product of any unlawful or unconstitutional act of any public servant.

While suppression of a second statement obtained by police might follow as a matter of course when a first statement is obtained on findings of violation of the rights of an accused, it does not necessarily follow upon, as here, findings of no more than failure by the prosecution to meet its initial burden of coming forward with evidence of viability of the admissions claimed made.

Suppression is denied.

Submit order.

Dated: April 17, 1979
Buffalo, New York

/s/LEON N. ARMER

LEON N. ARMER
Justice of Supreme Court